

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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United States for the Use and Benefit of  
Outspan Construction, Inc.,

Plaintiff,

CV-06-0831 (CPS)

- against -

ORDER

Nagan Construction, Inc., et al.,

Defendants.

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No objections to the Report and Recommendation of  
Magistrate Judge Viktor V. Pohorelsky dated May 24, 2007, having  
been filed by the parties, the Report and Recommendation is  
hereby adopted. The complaint is hereby dismissed for lack of  
prosecution and the defendants' counterclaims are dismissed  
without prejudice.

The Clerk is directed to furnish a copy of the within  
to all parties and to the magistrate judge.

SO ORDERED.

Dated : Brooklyn, New York  
October 17, 2007

s/Hon. Charles P. Sifton

  
\_\_\_\_\_  
United States District Judge

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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United States for the Use and Benefit of  
OUTSPAN CONSTRUCTION INC.,

Plaintiff,

- v -

**REPORT AND RECOMMENDATION**

CV-06-831 (CPS)(VVP)

NAGAN CONSTRUCTION, INC., et al.,

Defendants.

-----X  
POHORELSKY, M.J.:

For the reasons below, I recommend that the plaintiff Outspan Construction, Inc.'s claims in this action be dismissed for want of prosecution, and that the defendants' counterclaims be dismissed without prejudice if the plaintiff's claims are dismissed.

At an initial conference in this action held in July 2006, the court entered a scheduling order affording the parties more than eight months, until March 31, 2007, to complete discovery. At a status conference in this action on April 6, 2007, upon learning that the plaintiff Outspan had not responded to the defendants' discovery requests and were overdue, the court entered an order directing Outspan to respond to the requests by April 27, 2007 with a clear warning that a failure to respond by that deadline would result in sanctions, including entry of a default. When the plaintiff failed to provide responses by the deadline, the defendants moved for sanctions by letter dated April 30, 2007. Counsel for the plaintiff promptly responded by letter dated May 2, 2007 advising the court that he had forwarded two letters by facsimile to the plaintiff's principal and sole owner, and had left five voicemail messages for him, all of which advised his client of the court-ordered discovery obligation and the potential consequences of a failure to respond. None of counsel's communications had provoked any response from his client.

The court therefore scheduled a hearing for today to address the defendants' motion for sanctions, at which counsel for the plaintiff and for the defendants both appeared. Counsel for the plaintiff advised the court that since his May 2 letter to the court he had made numerous additional attempts to communicate with his client, including one attempt this morning, but had still received no response. The defendants' counsel stated that given the plaintiff's non-responsiveness, he doubted whether pursuing a judgment on his clients' counterclaims would be

worthwhile, and that he was therefore prepared to agree to dismissal of the counterclaims, without prejudice, if the plaintiff's action was dismissed.

Accordingly, as it appears that the plaintiff has abandoned its claims and has no interest in proceeding with this action, the court recommends that the plaintiff's claims be dismissed for want of prosecution. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962); *Hoffman v. Wisner Classic Mfg. Co.*, CV-95-1058 (ADS), 1996 WL 296938, \*3-4 (E.D.N.Y. June 1, 1996). In addition, given the defendants' consent, the court recommends that the defendants' counterclaims be dismissed without prejudice.

\* \* \* \* \*

Any objections to the Report and Recommendation above must be filed with the Clerk of the Court with a copy to the undersigned within 10 days of receipt of this report. Failure to file objections within the specified time waives the right to appeal the District Court's order. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298 (2d Cir.), *cert. denied*, 113 S. Ct. 825 (1992); *Small v. Secretary of Health and Human Serv.*, 892 F.2d 15, 16 (2d Cir. 1989) (*per curiam*).

Viktor V. Pohorelsky  
VIKTOR V. POHORELSKY  
United States Magistrate Judge

Dated: Brooklyn, New York  
May 24, 2007